No. 82-1283

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

W.J. ESTELLE, JR.,

Petitioner

V.

ALBERT H. CARTER,

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

I. THIS COURT SHOULD GRANT CERTIORARI OR HOLD THE PETITION IN ABEYANCE PENDING RESOLUTION OF *BULLARD V. ESTELLE*, ON REMAND FROM THIS COURT, IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 2

A. To Suggest That *Estelle v. Bullard* Is Irrelevant To This Case Is Mere Speculation 3

B. The Court of Appeals Will Hold That No Adequate And Independent State Ground For Relief Supports The Granting Of Habeas Corpus Relief in *Bullard v. Estelle* 4

II. REVERSAL OF THE JUDGMENT IN THIS CASE WOULD HAVE A SIGNIFICANT EFFECT IN TEXAS, AS WELL AS ELSEWHERE 4

III. THE COURT SHOULD ACCEPT THIS OPPORTUNITY TO DECIDE WHETHER *ROBINSON V. NEIL*, 409 U.S. 505 (1972), MILITATES IN FAVOR OF THE RETROACTIVITY OF *BURKS* AND *GREENE* 6

IV. CONCLUSION 7

INDEX OF AUTHORITIES

Cases **Page**

Bullington v. Missouri, 451 U.S. 430 (1981) 3

Burks v. United States, 437 U.S. 1 (1978) 3

City of Mesquite v. Aladdin's Castle, Inc., _____U.S._____, 102 S.Ct. 1070 (1982) 4

Delaware v. Prouse, 440 U.S. 648 (1979) 4

Estelle v. Bullard, _____U.S._____, 102 S.Ct. 2927 (1982) 2,3

Ex parte Colunga, 587 S.W.2d 426 (Tex.Crim.App. 1979) 5

Ex parte Dickson, 583 s.W.2d 793 (Tex.Crim.App. 1979) 5

Ex parte Duran, 581 S.W.2d 683 (Tex.Crim.App. 1979) 5

Ex parte Mixon, 583 S.W.2d 378 (Tex.Crim.App. 1979) 5

Ex parte Reynolds, 588 S.w.2d 900 (Tex.Crim.App. 1979) 5,7

Greene v. Massey, 437 U.S. 19 (1978) 3

Mills v. Rogers, _____U.S._____, 102 S.Ct. 2083 (1982) 4

Oregon v. Kennedy, _____U.S._____, 102 S.Ct. 2083 (1982) 4

Robinson v. Neil, 409 U.S. 505 (1972) 6

South Dakota v. Neville, _____U.S._____, No. 81-1453 (U.S., Feb. 22, 1983) 4

United States v. Bodey, 607 F.2d 265 (6th Cir. 1979) 7

Zacchini v. Scripps-Howard Broadcasting Corp., 433 U.S. 526 (1977) 4

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W.J. Estelle, Jr., Director, Texas Department of Correction, Petitioner herein, by and through his attorney, the Attorney General of Texas, and submits this his reply brief:

I.

THIS COURT SHOULD GRANT CERTIORARI OR HOLD THE PETITION IN ABEYANCE PENDING RESOLUTION OF *BULLARD V. ESTELLE*, ON REMAND FROM THIS COURT, IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

In the petition for writ of certiorari, it was noted:

> On June 14, 1982, the Court granted Petitioner's writ of certiorari in *Estelle v. Bullard*, No. 81-1774, to review the precise retroactivity-double jeopardy question Petitioner seeks to raise herein. *See, Estelle v. Bullard*, _____U.S._____, 102 S.Ct. 2927 (1982). The Court should defer action upon the instant petition pending the outcome of *Estelle v. Bullard*. [footnote one]. [On January 17, 1983, the Court reversed and remanded the judgment in *Bullard* so that the Court of Appeals might determine whether an adequate state ground independently supports the judgment.] If the judgment is affirmed in *Bullard*, then it may be appropriate to deny the petition for writ of certiorari in this case. If the judgment in *Bullard* is reversed, however, then it undoubtedly will be proper to grant the writ of certiorari in this case, and reverse and remand the judgment for reconsideration in light of the holding in *Bullard*. The Court may wish to defer consideration of this petition until the Court of Appeals has decided *Bullard*.

(Petitioner for Writ of Certiorari at 8).

Respondent suggests that *Estelle v. Bullard* is potentially irrelevant to this case, and further that in any event, the Court of Appeals will find that adequate and independent state grounds support the judgment in *Bullard*, thereby precluding any further review in this Court. (Respondent's Brief in Opposition at 10-11). Neither suggestion has merit.

A. To Suggest That *Estelle v. Bullard* Is Irrelevant To This Case Is Mere Speculation.

This case presents only a question of the retroactivity of *Burks v. United States*, 437 U.S. 1 (1979), and *Greene v. Massey*, 437 U.S. 19 (1978). Because *Estelle v. Bullard* also presents the issue of the applicability of *Burks* and *Greene* to the punishment phase of a Texas habitual offender trial, it additionally presents the issue of the retroactivity of *Bullington v. Missouri*, 451 U.S. 430 (1981). Since it is theoretically possible that ultimately *Bullington* may be held prospective only, Respondent is technically correct in suggesting that it is conceivable that the Court in *Estelle v. Bullard* may not reach the question of the retroactivity of *Burks* and *Greene*.

This possibility, however, must be viewed as both remote and speculative. It is remote because in light of the close inter-relationship among *Bullington*, *Burks*, and *Greene*, it is unlikely that the outcome of the retroactivity issue will vary with respect to any of these cases. It is speculative because Petitioner has merely suggested that the Court *await the outcome* of further appellate proceedings in *Bullard*. Awaiting the outcome will enable the Court to be informed whether the theoretical possibility suggested by Respondent will materialize. The Court might then base its decision whether to grant certiorari in the instant case upon reality, not speculation.

B. The Court of Appeals Will Hold That No Adequate And Independent State Ground For Relief Supports The Granting Of Habeas Corpus Relief In *Bullard v. Estelle.*

Respondent states that "in all probability" the Fifth Circuit Court of Appeals will find independent and adequate state grounds to support the judgment in that case. Petitioner has attached as Appendix A to this reply brief his recently filed brief and supplemental letter brief in the Fifth Circuit in *Bullard v. Estelle,* on remand from this Court. Perusal of Petitioner's Fifth Ciruit brief in *Bullard* reveals that it is beyond peradventure that although there may be an *adequate* state ground supporting the granting of habeas corpus relief in Bullard's case, there is no *independent* state ground supporting such relief. That is, although one Texas case has cited a provision of the Texas constitution, as well as federal authorities, in support of the granting of relief in a case resembling Bullard's, it is obvious that that portion of the Texas constitution has no meaning apart or different from the corresponding federal constitutional provision. Under *South Dakota v. Neville,* _____U.S._____, No. 81-1453 (U.S., Feb. 22, 1983); *Mills v. Rogers,* _____U.S._____, 102 S.Ct. 2442 (1982); *Oregon v. Kennedy,* _____U.S._____, 102 S.Ct. 2083 (1982); *City of Mesquite v. Aladdin's Castle, Inc.,* _____U.S._____, 102 S.Ct. 1070 (1982); *Delaware v. Prouse,* 440 U.S. 648 (1979); and *Zacchini v. Scripps-Howard Broadcasting Corp.,* 433 U.S. 526 (1977), no adequate and independent state ground serves as a barrier to this Court's review of the questions presented in that case.

II.

REVERSAL OF THE JUDGMENT IN THIS CASE WOULD HAVE A SIGNIFICANT EFFECT IN TEXAS, AS WELL AS ELSEWHERE.

Respondent suggests that a reversal of the judgment in this case would have no effect on Texas law because of holdings of the Texas Court of Criminal Appeals and, for that reason, few, if any, Texas prisoners would be affected by such a reversal. Although Respondent admits that unknown numbers of prisoners in other juridictions would be affected by this Court's holding on the merits of the issue presented, Respondent is wrong even with regard to his statements concerning Texas law and Texas prisoners.

Respondent argues, "The Court of Appeals' holding on the issue of retrospectivity of *Burks/Greene* will have no effect in Texas, because Texas has had a similar rule since its decision in *Ex parte Reynolds,* Tex.Crim.App. 588 S.W.2d 900 (1979)." (Respondent's Brief in Opposition at 21). Although the holding of the Court of Appeals has little effect in Texas for the reason stated, a reversal by this Court would amount to a reversal of *Ex parte Reynolds,* as well as the other Texas cases that stand for the same proposition.[1]

There is no contention whatsoever in this case, nor could there be, that the decisions in any of the cited Texas cases rest upon any adequate or independent state ground. No constitutional or statutory provision in Texas law is even cited in support of the judgment in any of those cases. The decisions rest solely upon the Texas Court of Criminal Appeals' view of the double jeopardy clause of the United States Constitution. Accordingly, reversal in this case would in effect overrule all the Texas cases relied upon by Respondent.

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1. *Ex parte Colunga,* 587 S.W.2d 426 (Tex.Crim.App. 1979); *Ex parte Dickson,* 583 S.W.2d 793 (Tex.Crim.App. 1979); *Ex parte Mixon,* 583 S.W.2d 378 (Tex.Crim.App. 1979); and *Ex parte Duran,* 581 S.W.2d 683 (Tex.Crim.App. 1979).

Accordingly, it remains true that a reversal by this Court will prevent the invalidation of the convictions of a large but unknown number of Texas prisoners, as well as the convictions of many prisoners in other jurisdictions. There are more that 36,000 inmates presently within the Texas Department of Corrections. All who are entitled to relief under *Burks* and *Greene* have not yet received relief. Obviously the holding of the Court sought by Petitioner in this case will have an immediate controlling impact upon all pending and future such cases.

III.

THE COURT SHOULD ACCEPT THIS OPPORTUNITY TO DECIDE WHETHER *ROBINSON V. NEIL*, 409 U.S. 505 (1972), MILITATES IN FAVOR OF THE RETROACTIVITY OF *BURKS* AND *GREENE*.

Respondent implicitly admits that the holding in *Robinson v. Neil* is so nakedly terse that its application has led to wildly varying results upon the retroactivity of double jeopardy questions in the lower courts. Yet Respondent incredibly argues that to amplify the holding would be "to unduly restrict *Robinson v. Neil* and render it less useful in the analyzation of the propriety of retrospectivity for future cases as yet undecided," (Respondent's Brief in Opposition at 10), and that the holding in *Robinson v. Neil* should not be explained because it is "broad enough to apply to the variety of fact situations which might be presented by the criminal procedures of forty-nine states other than that before the Court,"(Respondent's brief in Opposition at 22). The Court in *Robinson v. Neil* simply did not say enough to prevent divergent applications in double jeopardy-retroactivity cases in the lower courts, as pointed out in the petition at 10 n. 3. It could not be clearer that the lower courts are in need of additional guidance upon such issues.

As to the precise issue presented in this case, the retroactivity of *Burks* and *Greene*, two lower courts have decided in favor of retroactivity. The Sixth Circuit did so with no analysis whatsoever in *United States v. Bodey*, 607 F.2d 265 (6th Cir. 1979). The Texas Court of Criminal Appeals has done so with erroneous analysis in *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim.App. 1979), and in other cases cited *supra*, at 5 n.1. This Court should decide the question now.

Respondent seems to concede that his argument in favor of retroactivity amounts to one that all double jeopardy decisions should be held retroactive because, in his opinion, and as the Court of Appeals in effect stated in this case, there are no factors that can ever outweigh Respondent's "basic and substantive [Fifth Amendment] rights, the benefit of which Respondent has been deprived during his seven years of incarceration on a charge of which he was, in the eyes of the law, acquitted." (Respondent's Brief in Opposition at 21). Indeed, Petitioner has characterized the holding of the Court of Appeals as a per se holding that all double jeopardy decisions are retroactive. (Petition for Writ of Certiorari at 15). Such a startling development in constitutional law should be announced only by this Court, after plenary consideration of the matter.

IV.

CONCLUSION

For these reasons, Petitioner respectfully prays that his petition for writ of certiorari be held in abeyance until resolution of *Bullard v. Estelle* in the United States Court of Appeals for the Fifth Circuit, and that following the decision in *Bullard* that the petition in this case be granted, and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES EDWIN BULLARD,
Petitioner-Appellee

V.

W J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent-Appellant

On Remand From
The United States Supreme Court

BRIEF FOR RESPONDENT-APPELLANT

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent-Appellant, and on remand from the United States Supreme Court submits this his brief:

STATEMENT OF THE ISSUE

DOES THE TEXAS CONSTITUTION, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS IN *EX PARTE AUGUSTA*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*), CONSTITUTE AN ADEQUATE AND INDEPENDENT GROUND FOR THE GRANTING OF HABEAS CORPUS RELIEF UNDER THE CIRCUMSTANCES OF THIS CASE?

STATEMENT OF THE CASE

The statement of the case set forth in the original brief for Appellant in this appeal provides the procedural history until this Court's affirmance of the holding of the district court in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). (Brief for Appellant at 3-4).

Subsequently, on March 23, 1982, Appellant filed a petition for writ of certiorari in the United States Supreme Court. Appellee submitted his brief in opposition on May 20, 1982. On June 14, 1982, the Supreme Court granted the petition for writ of certiorari, limited to questions one and three presented by the petition. Those questions were as follows:

(1) Are *Burks v. United States*, 437 U.S. 1 (1978), *Greene v. Massey*, 437 U.S. 19 (1978), and *Bullington v. Missouri*, 451 U.S. 430 (1980), applicable to Texas habitual offender sentencing procedures?
(3) Are *Burks v. United States*, *Greene v. Massey, and Bullington v. Missouri*, retroactive?

Estelle v. Bullard, _____U.S._____, 102 S.Ct. 2927 (1982). On August 23, 1982, Appellant submitted his brief for Petitioner. After Appellee had submitted his brief for Respondent, he filed a motion to dismissed the petition for writ of certiorari as improvidently granted. Relying upon *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*), he argued that "an intervening court decision or change in a statute eliminated the issue or made it unlikely that the question would arise again, at least in the same context." (Motion to Dismiss at 2). On November 22, 1982, Appellant submitted his response to the motion to dismiss the petition for writ of certiorari. On January 17, 1983, the Supreme Court vacated the judgment and remanded the case to this Court for consideration of the question now before the Court.

STATEMENT OF THE FACTS

The statement of facts is adequately set forth in the original brief for Appellant at 5-9.

SUMMARY OF THE ARGUMENT

This Court's affirmance of the granting of habeas corpus relief in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), was based solely upon the federal Constitution. Subsequently the Texas Court of Criminal Appeals in *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982), in exclusive reliance upon the authority of *Bullard v. Estelle*, overruled *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976), and three other Texas cases. The majority opinion is devoid of any reference to the Texas constitution.

A few months later, in *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*), the Court of Criminal Appeals decided that the double jeopardy clause of the Texas constitution, Tex. Const. art. I, §§14, 19, supported the same result that the court had reached in *Cooper v. State*. If the decision in *Ex parte Augusta* represents an adequate and independent state ground for relief, then apparently the Supreme Court will implement its general policy of avoiding constitutionally based decisions whenever possible.

Ex parte Augusta, however, is no such adequate and independent state ground. It is well settled that the mere citation of state constitutional or other authority in support of a principle with federal constitutional implications does not alone constitute an adequate and independent state ground for that principle. Where the state constitutional ground merely follows applicable federal law so that the state-based holding is congruent with the corresponding federally based holding, the state ground is not adequate and independent, but en-

tirely dependent upon that court's view of the applicable federal law. A reading of the Texas case cited above supports the principle that the citation to the Texas constitution in *Ex parte Augusta*, was simply a statement that its meaning is the same as the double jeopardy provisions of U. S. Const. amend. V. This conclusion is greatly strengthened by examination of the history of Texas' double jeopardy jurisprudence. Throughout the history of that jurisprudence, only extremely rarely has the Texas constitution even been cited as a ground for relief upon double jeopardy principles, much less ever been construed differently from the Texas courts' construction of federal constitutional law.

ARGUMENT AND AUTHORITIES

I. THE TEXAS CONSTITUTION, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS IN *EX PARTE AUGUSTA*, 639 S.W.2d 481 (Tex.Crim.App. 1982) (*en banc*), DOES NOT CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND FOR HABEAS CORPUS RELIEF UNDER THE CIRCUMSTANCES OF APPELLEE'S CASE.

Appellant does not believe that the reversal and remand by the United States Supreme Court in this case is an intimation that this Court's prior holding in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), is erroneous, or even that this Court's prior holding was deficient in any respect. Instead, it appears as an expression of the Court's reluctance to reach a constitutionally based decision when there exists an adequate and independent state ground for reaching the same result. E.g., *Mills v. Rogers*, _____U.S._____, 102 S.Ct. 2442 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, _____U.S._____, 102 S.Ct. 1070 (1982); *New York Transit Authority v. Beazer*, 440 U.S. 568, 582-83 n.22, 99 S.Ct. 1355, 1364

n.22 (1979); *Poe v. Ullman*, 367 U.S. 497, 502-09, 81 S.Ct. 1752, 1755-59 (1961); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 347-48, 56 S.Ct. 466, 483 (1936)(Brandeis, J., concurring). This policy is "supported, although not always required, by the prohibition against advisory opinions". *Mills v. Rogers*, _____U.S. at_____, 102 S.Ct. at 2452, citing, *United States v. Hastings*, 297 U.S. 188, 193, 56 S.Ct. 218, 220 (1935), prohibiting the Court from rendering "an expression of abstract opinion." The Supreme Court has often expressed its belief that the Courts of Appeals are in a superior position to determine whether there exists an adequate and independent state ground supporting the same result as the federal constitution might support. E.g., *City of Mesquite v. Aladdin's Castle, Inc.*, _____U.S. at_____, 102 S.Ct. at 1077. In making that determination in this case, Appellant urges the Court, as the Supreme Court has often said, that where the state law or constitution is "congruent with corresponding federal provisions," there is no independent and adequate state ground. *City of Mesquite v. Aladdin's Castle, Inc.*, _____U.S. at _____, 102 S.Ct. at 1076. Accord, *Zacchini v. Scripps-Howard Broadcasting Corp.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2853 (1977); *Mental Hygiene Department v. Kirchner*, 380 U.S. 194, 198, 85 S.Ct. 871, 874 (1965); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5, 71 S.Ct. 1, 3 (1950); *Minnesota v. National Tea Co.*, 309 U.S. 551, 554-55, 60 S.Ct. 676, 678 (1940); *State Tax Comm'n of Utah v. Van Cott*, 306 U.S. 511, 514, 59 S.Ct. 605, 606 (1939).

If the state law is thusly congruent with federal law:

> [O]ur correction of any federal error automatically would result in a revision of the Court of Appeals' interpretation of the Texas constitution. Instead of providing independent support for the judgment below, the Texas law, as understood by the Court of Appeals, would be dependent on our reading of federal law.

City of Mesquite v Aladdin's Castle, Inc., _____U.S. at _____, 102 S.Ct. at 1076-77.

Resolving the present issue is not in conflict with the well settled principle that a violation of state law cannot provide a basis for federal habeas corpus relief. That principle is firmly established by the language of 28 U.S.C. §2254(a), which authorizes a federal court to entertain an application for a writ of habeas corpus by a person held in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It is a principle also firmly established in the jurisprudence of the Supreme Court, *Engle v. Isaac*, 456 U.S._____, 102 S.Ct. 1558, 1568 n.21 (1982); *Smith v. Phillips*, 455 U.S.____, 102 S.Ct. 940, 948 (1982); and a plethora of this Court's decisions. E.g., *Llamas-Almaguer v. Wainwright*, 666 F.2d 191 (5th Cir. 1982); *Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979); *Butts v. Wainwright*, 575 F.2d 576 (5th Cir. 1978); *Loud v. Estelle*, 556 F.2d 1326, 1329 (5th Cir. 1977); *McKinney v. Parsons*, 513 F.2d 264, 267 (5th Cir.), cert. denied, 423 U.S. 960, 96 S.Ct. 376 (1975). As this Court has often said,

[W]e do not sit as a "super" state supreme court in a habeas corpus proceeding.

Billiot v. Maggio, 694 F.2d 98 (5th Cir. 1982); *Meyer v. Estelle*, 621 F.2d 769 (5th Cir. 1980); *Cronnon v. Alabama*, 587 F.2d 246, 250 (5th Cir. 1979); *Alvarez v. Estelle*, 531 F.2d 1319, 1322 (5th Cir. 1976), cert. denied, 429 U.S. 1044, 97 S.Ct. 748 (1977); *Martin v. Wainwright*, 428 F.2d 356, 357 (5th Cir. 1970).

This Court did not discuss the applicable provisions of the Texas constitution in its original opinion simply because they could have no relevance to the granting or denial of federal habeas corpus relief. The Court is asked to examine the state constitution on remand solely for

the purpose of aiding the Supreme Court's determination whether this case is a proper one for its review.

Nor does the existence of an adequate and independent state ground for relief support a dismissal of the case at this point for further exhaustion of state court remedies. It is well settled that after a habeas petitioner has once exhausted his state remedies, an intervening change in substantive federal law or an intervening change in procedural state law may require resubmission of a previously exhausted claim to the state courts. An intervening change in substantive state law, however, creates no such necessity, for the state courts have already had a full opportunity to apply state law to the facts of that particular case. *Francisco v. Gathright*, 419 U.S. 59, 95 S.Ct. 257 (1974); *Picard v. Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512-13 (1971); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194 (1967); *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978)(*en banc*); *Texas v. Payton*, 390 F.2d 261, 270 (5th Cir. 1968). [1]

With these principles in mind, Appellant now proceeds to a discussion of the issue upon remand.

Appellee's direct appeal from the judgment of conviction was affirmed in *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976). This Court later held that resentencing Appellee violated the double jeopardy clause of U.S. Const. amend V. *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). That decision also held retroactive the Supreme Court's decisions furnishing the basis for Appellee's cause of action. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852 (1981); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2051 (1978); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978).

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1. The Court's holding in *Canet v. Turner*, 606 F.2d 89, 91 (5th Cir. 1979), may represent an anomaly in this otherwise unanimous body of precedent.

On April 21, 1982, the Texas Court of Criminal Appeals decided *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982). In exclusive reliance upon the authority of *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982), the Court of Criminal Appeals overruled *Bullard v. State*, 533 S.W.2d 812 (Tex.Crim.App. 1976), and three other Texas cases, *Porier v. State*, 591 S.W.2d 482 (Tex.Crim.App. 1979); *Kormurke v. State*, 562 S.W.2d 230 (Tex.Crim.App. 1978); *Tyra v. State*, 534 S.W.2d 695 (Tex.Crim.App. 1976). Two judges of the Court of Criminal Appeals in concurring opinions would have also adopted the rule in *Bullard v. Estelle* on the basis of the Texas constitution. The majority opinion of seven judges, however, is devoid of any reference to the Texas constitution.

More recently, On October 6, 1982, the Texas Court of Criminal Appeals again wrote upon the issue before the Court in *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982)(*en banc*). The opinion was joined in by five judges; four others concurred in result only. Augusta affirmed the holding in Cooper, holding as follows:

> We believe that whether one applies the Double Jeopardy Clause of the Federal Constitution, see the Fifth Amendment to the United States Constitution, or applies art. I, Sections 14 and 19 of the Texas Constitution to the situation where the evidence is found lacking in the resolution of factual issues presented at the punishment stage of a trial, the State should not "get a second bite at the apple", at either a new punishment hearing or upon a retrial of the entire case. Thus, we hold that under either the Federal Constitution or the Texas Constitution, the State of Texas is precluded from relitigating an issue of fact at a second trial or at a second punishment hearing where it failed

> to properly litigate that factual issue at the first trial or at the first punishment hearing.

Ex parte Augusta, 639 S.W.2d at 485.

The essence of Appellee's contention in the Supreme Court that the writ of certiorari should be dismissed as improvidently granted is that the above reference to the Texas constitution furnishes an adequate and independent state ground supporting the granting of habeas corpus relief in this case. It appears to be Appellee's position that because he is now entitled to relief under the present state constitutional law in Texas, the present question is unlikely to arise again.

This contention is without merit. In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), a decision of the Delaware Supreme Court that the Supreme Court affirmed purported to rest upon provisions of both the federal and state constitutions. The Court held that review was not barred "where the state constitutional holdings depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments." 440 U.S. at 653, 99 S.Ct. at 1396. Where it appears that the scope of the state and federal constitutions are similar, to hold that the lower court's analysis under federal law is inaccurate is to hold that the lower court's application of state law was equally erroneous. This principle was recently affirmed in *Oregon v. Kennedy*, ___U.S.___102 S.Ct. 2083, 2087 (1982):

> Even if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 652, 568, 97 S.Ct. 2849, 2853, 53 L.Ed.2d 965 (1977).

This case is a classic illustration of the principles underlying *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct.

1391 (1979). In *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982), the Texas Court of Criminal Appeals overruled several Texas cases and adopted the rule of *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). The exclusive grounds of reliance were the reasoning in *Bullard v. Estelle*, and the United States Constitution. The seven-judge majority opinion is devoid of any reference to the Texas constitution. Judge Odom in his concurring opinion opined, "Today's decision should be grounded on both federal and state constitutional principles," 631 S.W.2d at 515, but the majority refused to do so.

In *Ex parte Augusta*, 694 S.W.2d 481 (Tex.Crim.App. 1982) (*en banc*), the court unanimously reaffirmed the holdings in *Bullard v. Estelle*, and *Cooper v. State*. The decision contains no additional reasoning whatsoever, but for the first time states that on the basis of the United States Constitution and the Texas constitution the rules in *Estelle v. Bullard* and *Cooper v. State*, should apply. The court in *Ex parte Augusta* gives no intimation or inkling of any suspicion that the applicable provisions of the Texas constitution have even a shade of meaning different from the applicable provisions of the United States Constitution. It is simply impossible reasonably to reach any conclusion except that, "[T]he state constitutional holding depended upon the state court's review of the reach of the Fourth and Fourteenth Amendments." *Delaware v. Prouse*, 440 U.S. at 653, 99 S.Ct. at 1396. If the Supreme Court were to reverse this Court's holding in *Estelle v. Bullard*, it is beyond speculation and in the realm of fantasy to imagine that the Texas Court of Criminal Appeals would do anything other than adopt that holding, particularly where four judges of the court refused to join in the opinion holding the Texas constitution applicable in the first place. Thus, as in *Delaware v. Prouse*, *Oregon v. Kennedy*, _____U.S._____, 102 S.Ct. 2083 (1982), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97

S.Ct. 2849 (1977), it is most certainly true that there exists no adequate and independent state ground for the holdings of the Texas courts.

It is worth noting that in other cases applying double jeopardy principles to Texas prosecutions, the Texas Court of Criminal Appeals has been equally reluctant even to cite, much less construe differently from the federal Constitution, the double jeopardy and due process clauses of Tex. Const. amend. I, §§14, 19, respectively. Recently in *Ex parte McWilliams*, 634 S.W.2d 815 (Tex.Crim.App. 1982) (*en banc*) (on rehearing), the court was faced with a golden opportunity to base the survival of the Texas carving doctrine, which is plainly not mandated by the Double Jeopardy Clause of the United States Constitution, upon the Texas constitution. Four dissenting judges urged the majority to do so. A majority of the court, however, proclaimed that the same result will follow in "double jeopardy questions under the strict construction of the Constitution and this State." *Ex parte McWilliams*, 634 S.W.2d at 824.

Appellee's review of the other Texas cases in other areas of double jeopardy jurisprudence reveals exclusive reliance on the United States Constitution and no intimation whatsoever that the Texas Constitution differs in any respect from the federal regarding the scope of the double jeopardy clause. The Court of Criminal Appeals has followed the federal rule regarding the attachment of jeopardy, both before and after *Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156 (1978). E.g., *Moore v. State*, 631 S.W.2d 245 (Tex.Crim.App. 1982); *Torres v. State*, 614 S.W.2d 436 (Tex. Crim.App. 1981); *Sanne v. State*, 609 S.W.2d 762 (Tex.Crim.App. 1980); *McElwee v. State*, 589 S.W.2d 455 (Tex.Crim.App. 1979); *Vardas v. State*, 518 S.W.2d 826 (Tex.Crim.App. 1975), cert. denied, 423 U.S. 904, 96 S.Ct. 206 (1976). The court has applied only federal constitutional principles where the prosecution has provoked a mistrial, *Durrough v. State*,

620 S.W.2d 134 (Tex.Crim.App. 1981), and in application of the manifest necessity doctrine, *McClendon v. State*, 583 S.W.2d 777 (Tex.Crim.App. 1979). The court has applied only federal law in deciding the effect of a former conviction, *Humphreys v. State* 565 S.W.2d 59 (Tex.Crim.App. 1978); a former acquittal, *Thompson v. State*, 527 S.W.2d 888 (Tex.Crim.App. 1975); and application of the collateral estoppel doctrine, *Warren v. State*, 514 S.W.2d 458 (Tex.Crim.App. 1974).

Indeed, although there may be other examples, Appellant knows of only one case in the history of Texas double jeopardy jurisprudence in which the state constitution was given any meaning whatsoever different from the Texas Court of Criminal Appeals' interpretation of the federal constitution. In *Foster v. State*, 635 S.W.2d 710 (Tex.Crim.App. 1982) (on rehearing *en banc*), a scant majority of the Court of Criminal Appeals relied upon the differing language of Tex. Const. art. I, §14, as compared to U.S. Const. amend. V, for the basis of its decision. The federal double jeopardy clause bars being "twice put in jeopardy." The state counterpart bars being "twice put in jeopardy" *and* being "again put upon trial." Based upon this difference in language, the Court of Criminal Appeals felt itself compelled to decide whether there was insufficient evidence in a case that the court had already decided must be reversed for a defective indictment. The significance of the sufficiency of the evidence question, of course, is that in the wake of *Burks v. United States* and *Greene v. Massey*, a retrial would be barred if the evidence were insufficient.

It is questionable whether even in *Foster v. State* the Court of Criminal Appeals reached a result different from the result that would be mandated by application of the federal constitution. The Supreme Court has held that a defective indictment does not prevent jeopardy from attaching. *Illinois v. Summerville*, 410 U.S. 458, 93 S.Ct. 1066 (1973); *Benton v. Maryland*, 395 U.S. 784,

796-97, 89 S.Ct. 2056, 2063-64 (1969); *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192 (1896). In any event, the holding in *Foster v. State* had nothing whatsoever to do with the holding in *Ex parte Augusta*. *Ex parte Augusta* relies upon none of the language of the Texas constitution cited by the court in *Foster v. State*. The two holdings are entirely separate and are not interrelated in any way. The holding in *Foster v. State*, therefore, as well as its reasoning, cannot provide a basis for a conclusion that *Ex parte Augusta* itself furnishes an adequate and independent state ground for the granting of habeas corpus relief in this case.

CONCLUSION

For these reasons, Appellant respectfully requests that the Court hold that there is no adequate and independent state ground for the granting of habeas corpus relief in Appellee's case.

Respectfully submitted,

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Attroneys For Respondent-Appellant

March 3, 1983

Hon. Henry A. Politz
Hon. Carolyn Randall
Hon. John V. Parker
Chief Judge, Middle District
of Louisiana, (sitting by designation)

RE: *Bullard v. Estelle,* No. 80-2087

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

The issue presented in this case upon remand from the United States Supreme Court is whether the Texas constitution provides an adequate independent state ground for the granting of habeas corpus relief. In Appellant's recently submitted brief, he argued that this case is indistinguishable from and controlled by *Delaware v. Prouse,* 440 U.S. 648, 98 S.Ct. 1391 (1979). In fact, the instant case was characterized as "a classic illustration of the principles underlying *Delaware v. Prouse,*" (Brief for Appellant at 11). Barely a week ago, the Supreme Court of the United States decided *South Dakota v. Neville,* _____U.S._____, No. 81-1453 (U.S., Feb. 22, 1983). The Court in *South Dakota v. Neville* held that its determination of the same question was governed by its holding in *Deleware v. Prouse. South Dakota v. Neville,* slip op. at 3-4 n. 5. Accordingly, the Court's holding in *Neville* strongly supports Appellant's position.

The substantive issue in *Neville* was whether the admission into evidence of the defendant's refusal to submit to a blood alcohol test, as explicitly authorized by a South Dakota statute, in a prosecution for driving while

intoxicated, offended his Fifth Amendment right against self-incrimination. The South Dakota Supreme Court had held, "[E]vidence of an accused's refusal to take a blood test violates the federal and state privilege against self-incrimination and therefore SDCL 32-23-10.1 is unconstitutional." *State v. Neville,* 312 N.W.2d 723, 726 (S.D. 1981). Thus, as Mr. Justice Stevens correctly noted, "[T]he South Dakota Supreme Court unambiguously held that the statute violated the State's Constitution." *South Dakota v. Neville,* slip op. at 1 (dissenting opinion of Stevens, J.). The majority of seven justices, however, noted that in spite of this holding, the South Dakota Supreme Court, after proceeding with its analysis under U.S. Const. amend. V, with appropriate citations of federal authority, merely "concluded without further analysis that the state privilege was violated as well." *South Dakota v. Neville,* slip op. at 3 n. 5. The majority stated:

> The analysis of the court below was remarkably similar to that of the state court opinion reviewed in *Delaware v. Prouse,* 440 U.S. 648, 651-53 (1979). The state court opinion analyzed various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment violated the police procedure at issue there, and then *summarily held* that the State Constitution was therefore also infringed.

Id. at 3-4 n. 5. (emphasis added). The Court concluded,

> Although this would be an *adequate* state ground for decision, we do not read the opinion as resting on an *independent* state ground. Rather, we think the court determined that admission of this evidence violated the Fifth Amendment privilege against self-incrimination, and then concluded without further analysis that the state privilege was violated as well.

Id. (emphasis in original). The Court so held in spite of a footnote in the opinion of the South Dakota Supreme Court strongly suggesting that the comparable state and federal constitutional provisions were not co-extensive. *State v. Neville*, 312 N.W.2d 723, 726 n. *.

In his dissent, Mr. Justice Stevens argued, "In this case we lack jurisdiction because the South Dakota Supreme Court has not indicated, explicitly or implicitly, that its construction of Article 6, §9, of the South Dakota Constitution was contingent or our agreement with its determination of the Fifth Amendment to the United States Constitution." *South Dakota v. Neville*, slip op. at 2 (dissenting opinion of Stevens, J.). Thus, the majority specifically rejected Justice Stevens's view that

> Unless we have explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the Federal Constitution, it is presumptuous—if not paternalistic—for this Court to make that assumption on its own.

Id.

The opinion of the Texas Court of Criminal Appeals in *Ex parte Augusta*, 639 S.W.2d 481 (Tex.Crim.App. 1982) (en banc), is remarkably similar to that of the South Dakota Supreme Court in *State v. Neville*. In holding that Petitioner Augusta was entitled to relief under the same circumstances as Appellee Bullard in this case, the Court of Criminal Appeals relied upon the authority and reasoning of *Burks v. United States*, 437 U.S. 19, 98 S.Ct. 2141 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151 (1978); *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852 (1981); and this Court's prior opinion in *Bullard v. Estelle*, 665 F.2d 1347 (5th Cir. 1982). The only state authority cited in support of the

substantive issue was *Cooper v. State*, 631 S.W.2d 508 (Tex.Crim.App. 1982), a decision that was devoid of even any reference to the state constitution or any other state ground for reversal. The opinion in *Ex parte Augusta* includes no discussion whatsoever of the applicable provisions of the Texas constitution, but instead, as in *State v. Neville*, simply summarily concluded that Augusta violated the double jeopardy clauses of both the federal and state constitutions. It appears beyond peradventure, therefore, "Although this would be an *adequate* state ground for decision, we do not read the opinion as resting on an *independent* state ground." *South Dakota v. Neville*, slip op. at 3 n.5 (emphasis in original).

The Supreme Court's opinion in *Neville* also illuminates the irrelevance of *Foster v. State*, 635 S.W.2d 710 (Tex.Crim.App. 1982). In *Foster*, the Court of Criminal Appeals examined a double jeopardy issue different from that presented in the instant case or in *Ex parte Augusta*. Based upon the holding and analysis of the court in *Foster*, a reasonable argument may be made that the Court of Criminal Appeals established an adequate and independent state ground for reversal by virtue of its reliance upon the differing language of the state and federal constitutional provisions regarding double jeopardy. *Foster v. State*, 635 S.W.2d at 714.

Similarly, in *State v. Opperman*, 247 N.W.2d 673, 674 (S.D.1976), the South Dakota Supreme Court in a case on remand from the United States Supreme Court emphasized the "independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution." Mr Justice Stevens relied upon *State v. Opperman* in his dissent in South Dakota v. Neville, slip op. at 4. The majority, however, apparently believed it to be irrelevant if in some other context the South Dakota Supreme Court had emphasized the independent nature of its own

constitutional provisions. The Court believed it to be of overriding importance that in the case before them, the South Dakota Supreme Court had failed to do so.

Accordingly, it is irrelevant whether in some other case pertaining to some other issue the Court of Criminal Appeals has established an adequate and independent state ground for granting relief. The Court of Criminal Appeals neglected to do so in *Ex parte Augusta* and *Cooper v. State*, the only state decisions pertaining to the issue presented in the instant case. That failure should reasonably preclude this Court from finding any adequate and independent state ground.

Respectfully submitted,

/s/ Douglas M. Becker

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Enclosure

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